STATE OF MICHIGAN

COURT OF APPEALS

KENNETH E. GOYINGS,

Plaintiff-Appellee,

v

FORREST D. NELSON and COLLEEN S. NELSON,

Defendants-Appellants.

UNPUBLISHED
October 18, 2005

No. 261965
Newaygo Circuit Court
LC No. 04-018737-CH

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's entry of judgment in favor of plaintiff in this action to quiet title to certain property. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendants own adjacent parcels of property in Wilcox Township. Plaintiff's parcel is situated directly to the east of defendants' property. In 2004 the Township filed a complaint alleging that defendants had violated a zoning ordinance by constructing an elevated deer blind within thirty feet of the eastern boundary of their property (hereinafter referred to as the Township case).[1] A survey (hereinafter referred to as the 2003 survey) determined the boundaries of defendants' property. The trial court granted the Township's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10), and ordered defendants to remove the blind or relocate it so that it did not violate the zoning ordinance.[2]

Plaintiff filed the instant suit claiming title to a portion of the property shown by the 2003 survey to be owned by defendants. Plaintiff relied on the alternate theories of acquiescence, adverse possession, and prescriptive easement, and sought to quiet title to the disputed property in his name. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing

[1] *Twp of Wilcox v Nelson*, Newaygo Circuit Court Docket No. 04-18731-CZ.

[2] In *Twp of Wilcox v Nelson*, memorandum opinion of the Court of Appeals, issued June 21, 2005 (Docket No. 260697), we affirmed the judgment.

that prior to 2003, the parties had treated a natural property line of tall trees and grass as the true property line, and not the line demarcated by the 2003 survey. The trial court granted the motion, finding that defendants produced no evidence to show that a question of fact existed as to whether the parties had acquiesced in the natural property line for the requisite period. The trial court ordered that the case remain open so that a new survey that recognized the natural property line could be prepared.

Defendants objected to entry of a judgment in favor of plaintiff, and asserted that plaintiff's claims were barred by the doctrine of collateral estoppel. The trial court rejected defendants' challenge and entered judgment in favor of plaintiff, noting that the location of the boundary between the parties' properties had not been adjudicated in the Township case.

We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Title to property can be obtained through acquiescence by: (1) acquiescence for the statutory period of fifteen years; (2) acquiescence following a dispute or agreement; or (3) acquiescence arising from intention to deed to a marked boundary. A claim of acquiescence to a boundary line for the fifteen-year statutory period, MCL 600.5801(4), requires a showing by a preponderance of the evidence that the parties acquiesced in the line and treated it as the true boundary for the statutory period, regardless of whether there was a bona fide controversy regarding the boundary. *Walters v Snyder*, 239 Mich App 453, 456-457; 608 NW2d 97 (2000); *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

Collateral estoppel precludes the relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior action culminated in a valid final judgment and the issue was actually and necessarily litigated in that action. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). In the subsequent action, the ultimate issue to be determined must be identical and not merely similar to that involved in the first action. *Eaton County Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). The parties must have had a full and fair opportunity to litigate the issue in the first action. *Kowatch v Kowatch*, 179 Mich App 163, 168; 445 NW2d 808 (1989). Mutuality of estoppel is generally a necessary element of collateral estoppel. *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000). We review the applicability of the doctrine of collateral estoppel de novo. *Id*. at 34.

The doctrine of collateral estoppel did not operate to preclude plaintiff from bringing the instant action. The issue of the location of the true boundary between plaintiff and defendants' properties was not litigated in the Township case. It appears that the 2003 survey was used in the Township case to establish the boundaries of defendants' property; however, nothing indicates that the trier of fact actually determined the location of the easterly boundary of defendants' property in that case. The issue raised in the instant case was not fully and fairly litigated by the parties and determined by the trier of fact in the Township case. *VanDeventer*, *supra*; *Kowatch*, *supra*. Furthermore, plaintiff was neither a party to nor in privity with the parties in the Township action. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995); cf. *Van Lowe-Miller Revocable Trust v Reedus*, unpublished opinion per

curiam of the Court of Appeals, issued February 15, 2005 (Docket No. 250966).[3] Collateral estoppel did not operate to bar plaintiff's action. *Ditmore, supra*.

Defendants have not addressed the merits of the trial court's decision that title to the disputed property rested with plaintiff pursuant to the doctrine of acquiescence. Therefore, we deem this issue to be abandoned. *Yee v Shiawassee County Bd of Comm'rs,* 251 Mich App 379, 406; 651 NW2d 756 (2002).

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey

[3] This same lack of privity renders the doctrine of res judicata, on which defendants originally relied in opposition to plaintiff's motion for summary disposition, inapplicable. *Kosiel v Arrow Liquors Corp,* 446 Mich 374, 379; 521 NW2d 531 (1994).